STATE OF MICHIGAN

COURT OF APPEALS

BRENT VEENSTRA,

Plaintiff-Appellant,

v

WASHTENAW COUNTRY CLUB,

Defendant-Appellee.

UNPUBLISHED
October 6, 2000

No. 216907
Washtenaw Circuit Court
LC No. 97-004385-NO

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant in this employment discrimination and breach of contract claim. We reverse.

I

In 1991, plaintiff entered into a one-year contract with defendant country club to provide golf professional services. Over the next five years, the parties renewed the contract on an annual basis, under essentially the same terms. In April 1996, plaintiff separated from his wife and, in May 1996, began cohabiting with another woman, who accompanied plaintiff to a Las Vegas golf tournament attended by other club members. Plaintiff's separation from his wife and his relationship with another woman became a topic of discussion among club members. Some members, and the wives of some members, found plaintiff's behavior offensive, as evidenced by a survey of club members and their open expressions of disapproval. At the conclusion of the 1996 golf season, defendant did not renew plaintiff's contract for 1997.

Plaintiff filed an action against defendant, alleging violation of the Civil Rights Act[1] (Count I) and breach of contract (Count II). Plaintiff claimed that his termination from employment was motivated by his marital status and that defendant used the membership survey to evaluate plaintiff's performance in violation of the parties' contract. Defendant filed a motion for summary disposition pursuant to MCR

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[1] Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*.

2.116(C)(10), contending that plaintiff's contract was not renewed because of plaintiff's deficient performance and that his evaluation was in accordance with the parties' contract. The trial court granted defendant's motion.

II

An order granting or denying summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id*. A court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence submitted by the parties. *Id*. If the party opposing the motion presents evidentiary proofs creating a genuine issue of material fact, summary disposition is improper. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455, n 2; 597 NW2d 28 (1999); *Murad v Professional and Administrative Union Local 1979*, 239 Mich App 538, 541; 609 NW2d 588 (2000).

III

We first address plaintiff's breach of contract claim. Plaintiff argues that defendant breached the parties' contract by using a general membership survey to evaluate plaintiff's performance.[2] Plaintiff contends that the contract provided that his performance must be evaluated by defendant's golf committee, and because the contract contains an integration clause, defendant's board of directors was precluded from considering the results of the membership survey in deciding whether to renew plaintiff's contract. We disagree.

The parties' contract provides in relevant part:

> The Golf Committee shall conduct a performance evaluation of the Pro [plaintiff] at least once yearly and report the same to the Board of Directors.
>
> * * *
>
> This Agreement contains the entire understanding between the parties and no change, addition, or amendment shall be made except by writing signed by both parties.

"Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court." *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). If the contract "fairly admits of but one interpretation," the contract is not ambiguous, and the language of the contract should be given its ordinary and plain meaning. *Id.* at 722.

[2] In 1996, prior to the decision on plaintiff's contract, defendant conducted a survey in which it asked members, among other questions, to evaluate four key managers at the country club: the club manager, the club pro (plaintiff), the greens superintendent, and the executive chef. More than two hundred members completed the survey. While the results for the other managers were positive, plaintiff's evaluation contained a number of unfavorable ratings, with some members commenting negatively on his marital situation and his "inappropriate social behavior."

In this case, the language of the contract is unambiguous. The contract only provides that the golf committee must perform an evaluation of plaintiff and report this evaluation to the board of directors. According to deposition testimony, this evaluation and report occurred. The contract does not state that the board must rely on this evaluation in determining whether to renew plaintiff's contract, nor does it provide that the golf committee's evaluation is the sole basis for deciding whether to renew plaintiff's contract. Defendant's use of a general membership survey for employee evaluation did not violate the parties' contract. The trial court did not err in granting summary dismissal of plaintiff's breach of contract claim.

IV

Plaintiff also contends that this Court must reverse the grant of summary disposition on his claim of marital status discrimination under the Civil Rights Act because the trial court's decision was based on *McCready v Hoffius (McCready I)*, 222 Mich App 210; 564 NW2d 493 (1997), which has since been overturned by our Supreme Court, *McCready v Hoffius (McCready II)*, 459 Mich 131; 586 NW2d 723 (1998), vacated in part on other grounds, 459 Mich 1235 (1999). Plaintiff contends that summary disposition was therefore improper because discrimination on the basis of unmarried cohabitation constitutes marital status discrimination under *McCready II*, and that he presented sufficient evidence to establish a genuine issue of material fact with regard to his discrimination claim. We agree.

A

MCL 37.2202(1); MSA 3.548(202)(1) provides in relevant part:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of … marital status.

In ruling on defendant's motion for summary disposition, the trial court cited the now-overturned decision in *McCready I, supra*, and concluded:

> [*McCready I*] holds that cohabitation is not a protected status. …
>
> * * *
>
> [F]rom the evidence presented by the parties, reasonable minds would conclude that if there was discrimination against Plaintiff, it was not based on his pending divorce but on his cohabitation with his mistress.
>
> Michigan law does not recognize cohabitation as a protected status under the Elliot-Larsen Civil Rights Act.

However, this Court's holding in *McCready I, supra* at 213, that the Civil Rights Act does not protect unmarried cohabitation, was subsequently overturned. *McCready II, supra* at 138, 140.

In *McCready*, the defendants landlords refused to rent to the plaintiffs because they were "single" and intended to live together. *McCready II, supra* at 134, 138, 145. The Supreme Court rejected the defendants' argument that their refusal to rent was based on the plaintiffs' conduct of unmarried cohabitation, rather than their marital status, and was not protected under the Civil Rights Act. *Id.* at 138. "[The] [p]laintiffs' marital status, and not their conduct in living together, is the root of the defendants' objection to renting apartments to the plaintiffs." *Id*. at 140. Thus, we conclude that to the extent that plaintiff establishes discrimination on the basis of his unmarried cohabitation, he has a valid claim for marital status discrimination under the Civil Rights Act.

B

A claim of employment discrimination may be established by direct or indirect evidence. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997); *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999). The evidentiary paths to proving discrimination vary depending on the type of proof involved, i.e., direct or circumstantial evidence of discriminatory animus. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606, 609-610; 572 NW2d 679 (1997). To survive a motion for summary disposition in a claim of employment discrimination, the plaintiff must present admissible evidence sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175-176; 579 NW2d 906 (1998); *Harrison, supra* at 612-613.

Direct evidence of discriminatory animus, causally related to a decisionmaker's action, ordinarily precludes a grant of summary disposition. *Graham, supra* at 676-677. "'Direct evidence' is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor." *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998). In this regard, racial slurs by a decisionmaker is sufficient evidence for a case to proceed to the jury. *Id*. at 677; *Harrison, supra* at 610. Likewise, a road commission manager's derogatory remarks about older workers and comments about "getting rid of" them is direct evidence of age discrimination precluding summary disposition. *Downey, supra* at 633-634.

In this case, we find that plaintiff presented direct evidence of discriminatory animus. Plaintiff presented the affidavit of Patrick Godfrey, defendant's outside operations manager, stating:

> On several occasions I heard Joe Russo, George Palagny, and John Beems, specifically express their disapproval about Mr. Veenstra's divorce from his wife and I specifically remember both Russo and Palagny saying that they [sic] the situation was "disgusting," and all of them referring to Plaintiff as a "slut" on more than one occasion and all saying that they "had to get rid of him."

It is undisputed that John Beems, a member of defendant's board of directors, voted against renewal of plaintiff's contract. The deposition testimony of board members Russo and Plagany established that they also voted not to renew plaintiff's contract. Further, plaintiff presented Beems' survey response in which he stated that plaintiff's handling of his personal life was reprehensible. These votes may have

been the deciding votes on the nine-member board. As in *Harrison*, *supra*, and *Downey*, *supra*, this direct evidence is sufficient to survive summary disposition.

Although defendant has articulated nondiscriminatory reasons for its action, e.g., plaintiff's bad attitude, arrogant and unfriendly manner, lack of integrity, and his unavailability to club members, these contentions are properly considered by the factfinder in its determination of the ultimate issue. In a claim of discrimination, the plaintiff always bears the burden of proving discriminatory animus and causation. *Harrison*, *supra* at 612-613. Nevertheless, a defendant may challenge the plaintiff's credibility, and alternatively, in a direct evidence case, may assume the burden of persuading the factfinder that, even if the plaintiff's allegations are true, the defendant would have made the same decision without consideration of the discriminatory factors. *Id.* at 613.[3]

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[3] Because our conclusion is premised on plaintiff's direct evidence of discrimination, we do not address the alternative analysis under the *McDonnell Douglas* formulation. See *Harrison*, *supra* at 610, n 10. However, we likewise conclude that the circumstantial evidence in this case is sufficient to survive summary disposition, given the history of plaintiff's contract renewals without question prior to 1996, and the strong evidence that plaintiff's pending divorce and unmarried cohabitation were a consideration in defendant's decision not to renew plaintiff's contract for 1997.